Supreme Court
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In The

Supreme Court

of the United States

October Term, 1996

POLY-TECH INDUSTRIES, INC.,

Petitioner,

v.

INSTY*BIT, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITION FOR WRIT OF CERTIORARI

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31pp

QUESTION PRESENTED

Whether the United States Court of Appeals for the Eighth Circuit properly reversed the United States District Court's award of Summary Judgment of no tradedress infringement where:

(1) a conflict exists between the United States Court of Appeals for the Eighth Circuit and the United States Courts of Appeals for the Third, Second, Sixth, and Federal Circuits on the standards to be applied in determining the existence of protectable tradedress for product configurations;

(2) affording tradedress protection in perpetuity to Respondent's product configuration under the Lanham Act, Section 43(a), 15 U.S.C. Section 1125, would be in conflict with 35 U.S.C. Section 154(a)(2) and 35 U.S.C. Section 173, related to United States Utility and Design Patent Laws where the features alleged to form the asserted trade dress are disclosed in the prior art and affording trade dress protection would be an unconstitutional taking of public property rights in view of U.S. Constitution, Article 1, Section 8, clause 8; and

(3) voluminous evidence of functionality of each and every feature and combination of features of Respondent's product configuration was presented to the United States District Court and the United States Courts of Appeals for the Eighth Circuit where functional features and combinations of functional features for product configurations disclosed in the prior art are not properly protectable as tradedress regardless as to whether or not other combinations of functional features may also be available for the product configuration.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Poly-Tech Industries, Inc., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled proceeding on October 21, 1996.

OPINIONS BELOW

The opinion and judgment of the Eighth Circuit Court of Appeals, dated September 10, 1996, was reported. A copy of the opinion is reproduced in the Appendix at p. 1a. The Order and Memorandum of Decision on Motion for Reconsideration and Order for Rehearing en banc before the Eighth Circuit Court of Appeals was dated October 21, 1996. A copy of that Order is reproduced in the Appendix at p. 47a. The Order Granting Summary Judgment of Non-Tradedress Infringement made by the United States District Court for the District of Minnesota was dated April 26, 1995. A copy of that Order is reproduced in the Appendix at p. 27a.

On October 21, 1996, the Eighth Circuit Court of Appeals denied rehearing and reconsideration en banc of the Eighth Circuit Court of Appeals' opinion, dated September 10, 1996, overturning the decision of the United States District Court for the District of Minnesota which granted summary judgment of non-tradedress infringement.

JURISDICTIONAL STATEMENT

The United States District Court for the District of Minnesota had jurisdiction over this action pursuant to 28 U.S.C. §1331 and 1338, in that this action arose under Section 43(a) of the Lanham Act, 15 U.S.C. §1125. The Eighth Circuit Court of Appeals had jurisdiction pursuant to 28 U.S.C. §1291 and §1294.

The jurisdiction of the Supreme Court to review the judgment of the Eighth Circuit Court of Appeals is invoked pursuant to 28 U.S. Section 1254(1).

Notifications required by Rule 29.4(b) and Rule 14.1(e)(v) have been made. Petitioner recites that 28 U.S.C. §2403(a) may apply, therefore, Petitioner has served herewith the Solicitor General of the United States at Room 5614, Department of Justice, 10th Street and Constitution Avenue Northwest, Washington, D.C. 20530. The Eighth Circuit Court of Appeals did not, pursuant to 28 U.S.C. §2403(a), certify to the Attorney General the fact that the constitutionality of an act of Congress was drawn into question

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Constitution Article 1, Section 8, Clause 8

> (8)to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

15 U.S.C. Section 1125(a) (January 16, 1996)

> (a)(1)Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which -
>
> (A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or
>
> (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographical origin or his or her or another person's goods, services, or commercial activities,

shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

35 U.S.C. Section 154(a)(20) (December 8, 1994)

Section 154 contents and term of patent.

(a)In general. -

(2) Term. - Subject to the payment of fees under this title, such grant shall be for a term beginning on the date on which the patent issues and ending twenty years from the date on which the application for the patent was filed in the United States or, if the application contains a specific reference to an earlier file, the application or applications under §§120, 121, or 165(c) of this title, from the date on which the earliest such application was filed.

35 U.S.C. Section 173 (December 8, 1994)

Section 173 term of design patent.
Patents for designs shall be granted for the term of fourteen years from the date of grant.

STATEMENT OF THE CASE

The United States District Court for the District of Minnesota had jurisdiction over this action pursuant to 28 U.S.C. §§1331 and 1338, in that this action arose under §43(a) of the Lanham Act, 15 U.S.C. §1125.

Between the fall of 1988 and August of 1994, Petitioner manufactured component parts for Respondent for tools described as quick-release chucks, counter-sinks, and drill guides, which are used as accessories for a standard Jacobs-style chuck of a common electric drill. (3a, 29a, 116a, 119a, and 120a) U.S. Patent Nos. 4,900,202 and 5,013,194, issued to Respondents principal for a "chuck assembly for tool bits". (144a to 152a) During the period between the fall of 1988 and August of 1994, Petitioner also sold Respondent's assembled tools as a portion of Petitioner's product line. (4a, 29a, 32a, and 115a to 117a)

In December of 1993, Petitioner filed a patent application for a new and improved "quick-release chuck having one-step lock and release assembly". (4a, 32a) This patent application issued as U.S. Patent No. 5,398,946 to principals of Petitioner on March 21, 1995. (141a to 143a)

When Petitioner advised Respondent in the summer of 1994, that Petitioner had developed a new quick-release chuck which Petitioner intended to sell in competition with Respondent, Respondent terminated business dealings with Petitioner. (4a, 32a)

Respondent, on November 2, 1994, initiated this action alleging, among other things, that Petitioner had infringed Respondent's tradedress related to the quick-release chuck, counter-sink, and drill guides. No patent infringement action was initiated or available to Respondent.

Respondent has identified the alleged tradedress for its quick-release chuck as the "combination of the color black; the shape of the shank, the size and dimensions of the sleeve, and the chamfered edge-raised knurled band-recessed smooth band-raised knurled band appearance of the chuck sleeve". (8a, and 36a) Respondent has identified the alleged tradedress for the countersink as the "combination of the color black; the shape and style of the set screw and opening; the use of two flutes; the shape of the collar; the raised edge on the countersinking portion; the overall size and dimensions; and the shape of the opening for receiving the shank in the collar". (8a, and 35a) Respondent has identified the alleged tradedress for the drill guides as including the combinations of "the color black; the steel colored bit; the exposed spring; the shape and style of the set screw and opening; and the shape of the opening for receiving the shank in the collar". (8a, and 36a) The quick-release chuck, countersink, and drill guide are depicted pictorially at 201a, 202a, and 204a to 206a.

On or about March 16, 1995, argument was presented to the United States District Court for the District of Minnesota on Respondent's Motion for a Preliminary Injunction and Petitioner's Motion for Summary Judgment of No Tradedress Infringement. In summary, Petitioner's argument of no tradedress

infringement was directed to the issues of lack of confusion due to clear, unambiguous, and visually distinct packaging for Petitioner's and Respondent's products; the lack of confusion due to the clear, unambiguous, and visually distinct product markings for the product configurations as unpackaged; the absence of secondary meaning for Respondent's products due to the extensive "private labeling" and the unavailability of tradedress protection due to the functionality of each and every feature and combination of features for Respondent's production configurations, especially in view of United States patent laws and the prior art of record.

On April 26, 1995, the United States District Court for the District of Minnesota entered summary judgment of non-tradedress infringement holding that Respondents had failed as a matter of law to present sufficient facts to establish a likelihood of confusion related to the total affect of (Respondent's) product and packaging on the eye and minds of the ordinary purchaser. (37a to 40a) The District Court also found that Respondent's survey was flawed and entitled to little probative weight on the issue of likelihood of confusion. (40a to 43a) The United States District Court did not independently brief the six factors as identified in *Co-Rect Products v. Marvey! Advertising Photography, Inc.*, 780 F.2d 1324, 1330, 228 USPQ 429, 432 (8th Cir. 1985) after the Court found insufficient facts, as a matter of law, on the issue of likelihood of confusion. The District Court also did not address Petitioner's arguments of lack of secondary meaning and the functionality arguments as related to lack of protectable tradedress for respondent's product

configuration in view of the prior art of record and United States patent laws.

Respondent appealed the decision of the United States District Court for the District of Minnesota to the Eighth Circuit Court of Appeals arguing that the District Court had erred in failing to separately analyze and brief the six *Co-Rect* factors, the District Court erred in finding no probative value of Respondent's survey, and that sufficient facts existed to overcome summary judgment of no likelihood of confusion due to the survey's opinion that a likelihood of post-sale confusion existed as directed to the chuck product configuration.

On September 10, 1996, the Eighth Circuit Court of Appeals issued an opinion overturning the United States District Court on the issue of likelihood of confusion, independently analyzing the six *Co-Rect* factors. (1a to 26a)

The Eighth Circuit Court of Appeals did not address the issues raised by Petitioner as to the conflict of tradedress protection to the United States utility and design patent laws specifically related to the previous dedication to the public of the functional features disclosed in the prior art which are now alleged to form Respondent's tradedress for the product configuration.

The Eighth Circuit Court of Appeals also failed to analyze whether or not the features of the product configuration alleged to be protectable through

tradedress were utilitarian regardless of whether or not other configurations of features were available.

Poly-Tech Industries, Inc. filed this Petition for a Writ of Certiorari on January 17, 1996.

REASONS FOR GRANTING WRIT

1. THE DECISIONS OF THE UNITED STATES CIRCUIT COURTS OF APPEAL ARE IN CONFLICT ON THE STANDARDS TO BE APPLIED IN DETERMINING THE EXISTENCE OF PROTECTABLE TRADEDRESS FOR PRODUCT CONFIGURATIONS.

The conflict centers upon the level of scrutiny to be implemented and the focus of the scrutiny when a product configuration is evaluated in order to determine the existence of protectable tradedress.

The United States Court of Appeals for the Third Circuit has held that extending tradedress protection to unprotected design elements of the product itself may be proper in rare instances where there is "a high probability that a product configuration serves a virtually exclusively identifying function . . . ." *Duraco Products, Inc. v. Joy Plastic Enter.*, 40 F.3d 1431, 1448, 32 USPQ2d 1724, 1738 (3rd Cir. 1994). Where the design serves any significant purpose other than source identification, however, congress has specified that patent law, rather than trademark law, is the appropriate means for protecting the design. The Court further stated that allowing such protection would be especially problematic because product design, unlike trademarks and traditional tradedress (such as packaging or labeling), is subject to "exhaustion". While there is a "practically inexhaustible set of distinct but approximately equivalent variations" of packaging and labeling options available for any given product, that

product's configuration "has finite competitive variations that . . . are equally acceptable to consumers". *Duraco*, 40 F.3d at 1448, 32 USPQ2d at *1738*. Allowing a producer to foreclose competitors from even one of these variations should not be permitted in the absence of a valid patent.[1]

The standard of the Third Circuit Court of Appeals for extension of tradedress protection to a product configuration is when the product configuration is "(i) unusual and memorable; (ii) conceptually separable from the product; and (iii) likely to serve primarily as a designator of origin for the product." *Duraco,* 40 F.3d at 1448, 32 USPQ2d at 1738. The Third Circuit has implemented a relatively higher level of scrutiny which specifically analyzes the features alleged to form the tradedress to determine if the alleged features serve virtually an exclusive identifying function prior to the extension of tradedress protection to the product configuration.

The United States Court of Appeals for the Eighth Circuit has rejected the position of the Third Circuit in *Duraco*. The Eighth Circuit Court of Appeals, in the case of *Stuart Hall Co. v. Ampad Corp.*, 51 F.3d 780, 787, 34 USPQ2d 1428, 1433 (8th Cir. 1995), has stated that "we decline to adopt the Third Circuit's standard." In addition, the Eighth Circuit, in *Stuart Hall* stated that "we decline to create a distinction between protection of packaging and protection of a product configuration such as a

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[1] Bradley K. Groff, *Bare-Fisted Competition or Palming Off? Product Design as Tradedress Under the Lanham Act*, 23 AIPLA Q.J. 65, 78, 79.

distinction would run contrary to the holding of Two Pesos."[2] 51 F.3d at 788, 34 USPQ2d at 1434. The standard for identification of tradedress for products in the Eighth Circuit was stated in Stuart Hall to be as follows:

> If the particular feature is an important ingredient in the commercial success of a product, the interest in free competition permits (sic) its imitation in the absence of a patent or copyright. On the other hand, where the feature, or, more apply, design, is a mere arbitrary embellishment, a form of dress for the goods primarily adopted for purposes of identification and individuality and, hence, unrelated to basic consumer demand in connection with the product, imitation may be forbidden where the requisite showing of secondary meaning is made. Under such circumstances, since effective competition may be undertaken without imitation, the law grants protection.

51 F.3d at 790, 34 USPQ2d at 1435 (citing *Armotique, Inc. v. Global Seal, Inc.*, 28 F.3d 863, 873 (8th Cir.)).

The Eighth Circuit has applied a relatively low level of scrutiny for evaluation of a product configuration for the availability of tradedress protection. Specifically, the Eighth Circuit in this case stated that "in assessing functionality, the appropriate inquiry is whether the collection of design elements,

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[2] *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 23 USPQ2d (BNA) 1081 (3rd Cir. 1994).

taken as a whole, are functional, not whether individual elements of the tradedress could be characterized as such". (25a)

The Eighth Circuit's failure to analyze individual elements for functionality in this case is contrary to the Third Circuit case of *Duraco* and the Eighth Circuit's own case of *Stuart Hall*, which states ". . . we find no difficulty in looking at the specific feature of a product and determining whether and to what degree that feature is dictated by the nature of the product." 51 F.3d at 788, 34 USPQ2d at 1434. The Eighth Circuit Court of Appeals failed to follow its own law and scrutinize the specific features of a product for determination of the functionality of the specific features under consideration.

The United States Court of Appeals for the Federal Circuit has identified the standards for tradedress protection as "a plaintiff must prove (1) that its mark is inherently distinctive or has acquired distinctiveness through secondary meaning; and (2) that a likelihood of confusion exists between its product and the defendant's". *Imagineering, Inc. v. Van Klassens, Inc.* 53 F.3d 1260, 1263, 34 USPQ2d 1526, 1528 (Fed. Cir. 1995). The Federal Circuit appears to have neglected the non-functionality requirement of tradedress even though the case involved the product configuration of furniture.

The United States Court of Appeals for the Second Circuit has a standard which differs from the Third and Eighth Circuits. The Second Circuit, in *Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema,*

Ltd., 604 F.2d 200, 203-04, 203 USPQ 161, 163 (2nd Cir. 1979), stated that "when a feature of the construction of the item is arbitrary, the feature may become a trademark even though it serves a useful purpose . . . thus, the fact that an item serves or performs a function does not mean that it may not at the same time be capable of indicating sponsorship or origin, particularly where the decorative aspects of the item are non-functional". According to the Second Circuit, it is crucial that the inquiry not focus on the usefulness of the article overall, but rather focus on the utility of that exact feature or combination of features that is claimed as a protectable tradedress or mark.[3]

The United States Court of Appeals for the Sixth Circuit has yet another standard for tradedress protection for a product configuration. The Sixth Circuit stated that "trademark law does not protect the functional features of products because such protection would provide a perpetual monopoly of features which could not be patented." *Ferrari S.P.A. v. Roberts*, 944 F.2d 1235, 1246, 20 USPQ2d 1001, 1011 (6th Cir. 1991) (citing *Keene Corp. v. Paraflex Indus, Inc.*, 653 F.2d 822, 825, 211 USPQ 201 (3rd Cir. 1981)). "A product feature is functional if it is essential to the use or purpose of the article or 'if it affects the cost or quality of the article'". *Id.* (quoting *Inwood Laboratories, Inc. v. Ines Laboratories, Inc.*, 456 U.S. 844, 850, 10, 214 USP1 (1982)).

A conflict exists between the Circuit Courts of Appeal with respect to the standards and level of

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[3] J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition, Sec. 7.26(3)(b) (3rd Ed. 1995).

scrutiny to be applied in determining the existence of protectable tradedress for product configurations under the Lanham Act, §43(a), 15 U.S.C. §1125 necessitating Supreme Court intervention and direction.

In addition, the Court of Appeals for the Federal Circuit in the case of *In Re. Bose Corp.*, 772 F.2d 866, 871-73, 227 USPQ 1, 5-6 (Fed. Cir. 1985) has indicated that the availability of other forms or shapes does not detract from the functional character of the subject configuration. The Eighth Circuit Court of Appeals in this case refused to examine or analyze the functionality of the alleged product configuration in their decision on summary judgment which is contrary to the law of the Eighth, Federal Circuits, and Third Circuit Court of Appeals, necessitating Supreme Court review.

2. THE EXTENSION OF TRADEDRESS PROTECTION IN PERPETUITY TO PRODUCT CONFIGURATIONS FOR TOOLS UNDER THE LANHAM ACT, §43(A), 15 U.S.C. §1125, IS IN CONFLICT WITH 35 U.S.C. §154(A)(2) AND 35 U.S.C. §173 RELATED TO THE UNITED STATES UTILITY AND DESIGN PATENT LAWS, WHERE THE FEATURES ALLEGED TO FORM THE TRADEDRESS FOR THE PRODUCT CONFIGURATION ARE DISCLOSED AS FUNCTIONAL, AND HAVE BEEN DEDICATED TO THE PUBLIC, WITHIN THE PRIOR ART. (153A TO 198A)

The extension of tradedress protection to the product configuration in this case would be an unconstitutional taking of public property rights in view of United States Constitution Article I, Sec. 8, Cl. 8, which secures to inventors for limited times, the exclusive rights to their respective inventions.

The purpose of the patent laws are to foster and reward invention and to promote the disclosure of inventions to the public in order to stimulate further innovation while simultaneously permitting the public to practice the invention upon the expiration of the patent. The patent laws seek to ensure that ideas in the public domain remain there for free use by the public. *Aronson v. Quick Point Pencil Co.*, 440 U.S. 257, 262, 99 S.Ct. 1096, 1099, 201 USPQ 1, 4 (1979) (citing *Kewanee Oil Co. v. Bicron Corp.*, 416 US 470, 480-81, 181 USPQ 673, 678 (1974)).

The extension of tradedress protection to alleged design features of the product itself, rather than to the product's packaging or labeling risks upsetting the delicate balance of the interests which Congress has established through the patent system. In *Qualitex v. Jacobson Products Co.*, 115 S.Ct. 1300, 1304, 34 USPQ2d 1161, 1163 (1995), the Supreme Court has stated that "it is the province of patent law, not trademark law, to encourage invention by granting inventors a monopoly over new product designs . . . ."[4]

Failure to award summary judgment, and the extension of tradedress protection to features previously disclosed as functional within the prior art, as a matter of law, circumvents the United States utility and design patent laws which have constitutional priority over the Lanham Act. (153a to 198a)

The failure of the District Court and the Eighth Circuit Court of Appeals, on de novo review, to specifically analyze the features of the product configuration asserted to be protectable through tradedress for functionality in view of the prior art of record, was clear error especially in light of Respondent's admission that the product configuration was derived from the prior art air hose couplers. (105a, 153a to 198a) The failure to analyze a product configuration for functional features was error regardless as to whether or not other combinations of features are alleged to be available. *In Re. Bose Corp.*, 772 F.2d 866, 227 USPQ 1 (Fed. Cir. 1985). In

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[4] Bradley K. Groff, *Bare-Fisted Competition or Palming Off? Protection of Product Design as Tradedress Under the Lanham Act,* 23 AIPLA Q.J. 65.

addition, the alleged existence of alternative features for a product configuration does not change the character of the features of the product under scrutiny; the alleged tradedress is functional in view of the prior art of record and therefore tradedress protection is unavailable. The failure by the Eighth Circuit Court of Appeals, and the District Court, to perform a functionality analysis as a matter of law, is clearly erroneous, requiring Supreme Court intervention.

The failure to perform a functionality analysis of the product configuration in this case would permit, as a matter of law, the violation of United States Constitution Article 1, Section 8, Clause 8, and would undercut the Constitution and congressional intent of the United States utility and design patent laws.

Design protection legislation has been introduced in virtually every session of Congress since 1917, yet has never been enacted. *Duraco Products,* 40 F.3d at 1446, 32 USPQ2d at 1736. The fact that Congress has not seen fit to amend the design patent laws likely reflects Congressional satisfaction with the status quo. The expense and difficulty in obtaining a design patent, and the requirements of novelty and non-obviousness likely result in Congress' belief that designs which are not sufficiently inventive or ornamental to meet the requirements of the design patent law should remain in the public domain, free for all to copy and exploit at will.[5] The extension of tradedress protection to public domain features as

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[5] Bradley K. Groff, *Bare-Fisted Competition or Palming Off? Protection of Product Design as Tradedress Under the Lanham Act,* 23 AIPLA Q.J. 65.

disclosed in the prior art therefore is clearly in conflict with Congressional intent. When an unpatented design is removed from the public domain by an overbroad construction of tradedress under the Lanham Act, the efficient operation of the Federal patent system is compromised and Congress' balance of the costs and benefits of patent protection is upset.[6]

3. VOLUMINOUS EVIDENCE OF PRIOR ART UNITED STATES PATENTS SHOWS THE DEDICATION TO THE PUBLIC OF EACH AND EVERY FEATURE AND COMBINATION OF FEATURES OF RESPONDENT'S PRODUCT CONFIGURATION. (141a to 198a)

In addition, overwhelming evidence as to the functionality of each and every feature and combination of features of Respondent's product configuration was presented for consideration to the District Court and Eighth Circuit Court of Appeals. (60a to 140a, and 199a to 222a) This evidence was never considered by the District Court nor the Eighth Circuit Court of Appeals. Supreme Court review of the decision of the Eighth Circuit Court of Appeals is necessary for correction of an analysis which has so far departed from the accepted and usual course of judicial proceedings, with respect to the functionality of a product configuration, as to call for the exercise of the Supreme Court's power of supervision.

Petitioner, in support of its Motion for Summary Judgment, before the District Court and the Eighth Circuit Court of Appeals, submitted copies of

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[6] *Id.* at 75-76.

23 United States utility patents which showed that each and every feature alleged by Respondent to form the tradedress for Respondent's product configuration had been previously dedicated to the public. (141a to 198a) This evidence was not contested or challenged by Respondent. The Eighth Circuit Court of Appeals and the District Court never analyzed or reviewed this evidence in rendering their respective decisions on summary judgment (1a to 35a).

The failure of the Eighth Circuit Court of Appeals to consider evidence of prior art is shown in its opinion where the Eighth Circuit states:

> Although Poly-Tech argues that the exterior design of Insty*Bit's quick-change products - - including the color black and the appearance of the sleeve and shank - - are primarily functional because they remain necessary to the commercial success of these products, Insty*Bit has presented evidence that competing manufacturers have adopted different design features for their quick-change products . . . thus, a genuine issue of material fact exists as to whether or not the design of Insty*Bit's quick-change products is functional. (25a)

In addition, the Eighth Circuit Court of Appeals and the District court failed to analyze whether or not tradedress protection was available for Respondent's alleged product configuration as a threshold inquiry. *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 768-69, 23 USPQ2d 1081, 1084 (1992). The Eighth Circuit Court of Appeals and the District Court also

failed to inquire as to whether the alleged product configuration was a utilitarian shape for a utilitarian object. *Brunswick Corp. v. British Seagull, Ltd.*, 35 F.3d 1527, 1531, 32 USPQ2d 1120, 1122-23 (Fed. Cir. 1994).

In that regard, the Eighth Circuit Court of Appeals and the District Court did not consider the uncontested and unchallenged Affidavits of Petitioner's technical expert (48a to 104a) and Petitioner's principal (113a to 140a), which, in detail, explain and indicate how each and every feature and combination of features alleged by Respondent to form a tradedress for a product configuration were dictated solely and exclusively by utilitarian considerations. (27a to 112a, 124a to 137a, and 199a to 222a)

Petitioner's submission of prior art (141a to 198a), and expert affidavits, establish an overwhelming volume of evidence as to the functionality of each and every feature and combination features of Respondent's product configuration. Respondent was therefore required to present some credible evidence in response to Petitioner's evidence in order to avoid entry of summary judgment pursuant to *Liberty Lobby, Inc. v. Anderson*, 477 U.S. 242, 248-52, 106 S.Ct. 2505, 2510-12 (1986). Respondent clearly has not submitted even a scintilla of evidence in response to Petitioner's evidence related to the functionality of each and every feature and combination features of Respondent's product configuration. No such evidence is available to Respondent. The Eighth Circuit Court of Appeals and the District Court have therefore so far deviated from the accepted and usual course of judicial proceedings

with respect to functionality analysis of a product configuration as to call for the exercise of the Supreme Court's power of supervision.

CONCLUSION

The Petitioner requests review by the Supreme Court in order to resolve the conflict between the Circuit Courts of Appeals with respect to the standards to be applied in determining the existence of protectable tradedress for product configurations. Supreme Court review is also requested to resolve the conflict related to the potential for perpetual protection of product configurations through tradedress as related to the United States utility and design patent laws, particularly with respect to functional features previously dedicated to the public within the prior art.

In addition, Petitioner requests review by the Supreme Court in view of the overwhelming evidence of functionality of each and every feature of Respondent's product configuration which thereby entitles Appellant to an award of summary judgment in this proceeding.

These issues are very important for determining the scope of tradedress protection as related to product configurations in view of the United States patent laws and United States Constitution and have far-reaching consequences within the area of intellectual property law.

The Petition for Certiorari should therefore be granted.

Respectfully Submitted,

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